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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 528

SOUTHWEST FOREST INDUSTRIES, INC.

Petitioner,

v.

WESTINGHOUSE ELECTRIC CORPORATION,

Respondent.

RESPONSE TO PETITION FOR CERTIORARI

LEWIS & ROCA

By John P. Frank
Paul G. Ulrich
Attorneys for Respondent

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Respondent requests that the petition for certiorari in this matter be denied.

OPINIONS BELOW

The unreported Opinion, Order and Judgment of the United States District Court for the District of Arizona appear at Petition Appendix pp. xix-xxxi. The Opinion of the United States Court of Appeals for the Ninth Circuit (Duniway, J.) affirming the District Court is reported at 422 F.2d 1013 (1970), Petition Appendix pp. i-xiii.

JURISDICTION

The judgment of the Court of Appeals was entered on February 9, 1970. A timely filed petition for rehearing was denied

on May 15, 1970; this petition for certiorari was filed on August 11, 1970. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

We cannot agree that the "question presented" as offered by petitioner was a question actually presented to and decided by the courts below. We therefore restate the question as follows:

> In this diversity case, have the two concurring courts below fairly determined claims involving alleged negligence in repair on either contract (Pennsylvania law) or tort (Arizona law) theories under the principles of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)?

STATUTE INVOLVED

12A Purdon's Pa. Rev. Stat. § 2-719 (Uniform Commercial Code § 2-719).

STATEMENT

A. *Factual Background*

This is a diversity case brought in Arizona. Southwest Forest Industries, Inc. (Southwest) claimed consequential business losses as the result of alleged breaches of warranty, negligence, and strict liability in tort by Westinghouse Electric Corporation (Westinghouse) with respect to a 25,000 kilowatt steam turbine generator unit installed in a pulp and kraft paper mill near Snowflake, Arizona.

After preliminary feasibility studies, Southwest engaged Rust Engineering Company (Rust), a large, experienced, consulting engineering firm, to construct the mill and to obtain manufacturers' warranties for its machinery and equipment (Appendix, p. xxi). All of the contract documents were exchanged in Pennsylvania. It has been agreed throughout that Pennsylvania law applies to the contract phases of the claim (Appendix, pp. x, xxvii; Petition, p. 5). The warranty under which Southwest claims here is as follows:

"WARRANTY—Westinghouse, in connection with apparatus sold hereunder, agrees to correct any defect or defects in workmanship or material which may develop under proper or normal use during the period of one year from the date of shipment, by repair or by replacement f.o.b. factory of the defective part or parts, and such correction shall constitute a fulfillment of all Westinghouse liabilities in respect to said apparatus, unless otherwise stated hereunder. Westinghouse shall not be liable for consequential damages."

The unit was installed in the Southwest plant in late 1961. Alleged defects in it caused delay in the start-up of the mill between December, 1961 and April, 1962. Southwest sued for the consequential damages resulting from this delay. No damages resulting from personal injury or physical harm to property are involved.

B. *Proceedings in the District Court.*

1. *Tort Theory*

Southwest claimed that certain repairs made by Westinghouse were negligently done. Since the only damages sought were for consequential business losses, the lower courts held, with due regard for Pennsylvania law, that warranty provisions were valid and enforceable which limited liability to repair and replacement of defective workmanship or materials and expressly excluded liability for consequential damages. If the claim were regarded as one of pure tort law, Arizona law applies (Appendix, pp. x-xi, xxvi). Both courts held that under Arizona law there was no such tort, apart from a contractual duty (Appendix, pp. xi, xxx). This portion of the claim was treated by the Court of Appeals as having perhaps been waived (Appendix, p. x). Not much is made of this phase of the case in this petition, but we treat it briefly below.

2. *Warranty Theory.*

Petitioner's stand on the warranty clause is a variant of the tort theme. The claim here is that (a) there was negligent repair;

(b) that there were consequential damages for which Westinghouse is liable. The District Court held that, in the light of Pennsylvania law and of the express language of the warranty, there could be no contractual recovery on this theory. It also held that all of Southwest's claimed damages were consequential damages, that the turbine generator unit was a highly specialized, custom built piece of machinery, built to particular specifications and tested in the factory before delivery under supervision of engineers representing both parties (Appendix, pp. xxv-xxvi), that there was no evidence that Westinghouse had failed to perform its affirmative warranty duties of correction and replacement (Appendix, p. xvii), and that under Pennsylvania law, the limitations of liability in the Westinghouse warranty were valid and enforceable. Although liability for consequential damages resulting from negligence had not been expressly disclaimed, the District Court held that the provision limiting liability so as to exclude consequential damages was also sufficiently broad to limit liability for such damages resulting from negligence, and, in particular, to limit liability to replacement required as the result of faulty workmanship. (Appendix, pp. xxix-xxx).

C. *Proceedings in the Court of Appeals*

The Court of Appeals affirmed the District Court, holding that the District Court's decision was entered on the merits following trial to the court (Appendix, p. vii). It also held that the Westinghouse form of warranty was controlling and that a claim of unconscionability had not been properly raised below. (Appendix, pp. viii-ix). The Court of Appeals affirmed the District Court's findings (1) that there had been experienced purchasing departments, staffs of engineers, and legal departments available to all three companies, (2) that Rust had had great experience in purchasing electrical equipment from Westinghouse, and (3) that all purchasing departments involved were familiar with the Westinghouse order and acknowledgement forms. (Appendix, p. ix). As to the negligence issues, the Court of Appeals affirmed the Dis-

trict Court's holding, under Pennsylvania law, that the limitation of liability provisions precluded recovery for the claimed consequential damages on a negligence theory (Appendix, p. x).

The Court of Appeals also observed that Southwest might have waived its argument that Westinghouse was liable under a pure tort negligence theory under Arizona law, since trial counsel repeatedly asserted that Southwest was proceeding only on a contract theory. It noted that both parties assumed until after the change in counsel that a decision for Westinghouse on the warranty issues would conclude the trial and that neither party expected the court to make a finding on negligence. (The District Court had dismissed the jury without protest from Southwest's trial counsel after its decision.) (Appendix, pp. x-xi). Finally, the Distrirt Court's holding as to the limits on the doctrine of strict liability in tort was affirmed, Appendix, p. xii). Only the District Court's ruling as to the alleged negligent repair of the turbine generator unit has been brought here for review (Petition, p. 5.).

REASONS FOR DENYING THE WRIT

A. *The Lower Courts Properly Determined Questions of State Law That Should Not Be Reviewed Here.*

1. *Limitation of warranty liability under Pennsylvania law.*

The determination by the Court of Appeals that the limitation of liability provisions of the Westinghouse form of warranty were valid and enforceable was made simply as a matter of Pennsylvania law. The Court of Appeals expressly affirmed the District Court's finding that, under Pennsylvania law, " 'the parties to an agreement may contract as to limitation of liability resulting from breach of both expressed and implied warranties.' Such a limitation may also preclude recovery for losses resulting from negligence." (Appendix, p. x). Numerous Pennsylvania authorities were cited in support of this holding, including *Mayo v. Mc-*

Closkey & Co., 200 F.Supp. 7 (E.Dd. Pa. 1961); *Shafer v. Reo Motors, Inc.*, 108 F.Supp. 659 (W.D.Pa. 1952); *Charles Lachman Co. v. Hercules Powder Co.*, 79 F.Supp. 206 (E.Dd.Pa. 1948); *Eimco Corp. v. Joseph Lombardi & Sons*, 193 Pa. Super. 1, 162 A.2d 263 (1960); and *Magar v. Lifetime, Inc.*, 187 Pa. Super. 143, 144 A.2d 747 (1958). (Appendix, p. x).

Southwest does not contend that these decisions were not properly applied by the lower courts. The only Pennsylvania case cited in Southwest's petition is *Dilks v. Flohr Chevrolet, Inc.*, 411 Pa. 425, 192 A.2d 682, 685 (1963) (Petition, p. 12). *Dilks* holds only that as between a landlord and tenant an ambiguous lease should be construed against one who claims immunity from his negligence and does not concern limitation of liability in a commercial sales context where only consequential damages have been claimed. Pennsylvania has recently reaffirmed its rule that a warranty provision expressly excluding consequential damages is valid and enforceable. *K. & C., Inc. v. Westinghouse Elec. Corp.*, 437 Pa. 303, 263 A.2d 390 (1970). That is the situation presented here.

The District Court held that the parties had agreed to the Westinghouse warranty, both as the legal result of the documents exchanged and by reason of conduct which assumed the Westinghouse warranty controlled (Appendix, pp. xxvii-xxviii). It further held, as a matter of Pennsylvania law, that the provision limiting liability so as to exclude consequential damages was sufficiently broad also to limit liability resulting from negligence, and, in particular, to limit liability to replacements required as the result of faulty workmanship, citing *Shafer v. Reo Motors, Inc.*, 205 F.2d 685 (3d Cir. 1953); *Charles Lachman Co. v. Hercules Powder Co.*, 79 F.Supp. 206 (E. D. Pa. 1948); *Cannon v. Bresch*, 307 Pa. 31, 160 A. 595 (1932); *Atherton v. Clearview Coal Co.*, 267 Pa. 425, 110 A. 298 (1920); *Wright v. Sterling Land Co.*, 157 Pa. Super. 625, 43 A.2d 614 (1945); *Siegel Co. v. Philadelphia*

Record Co., 348 Pa. 245, 35 A.2d 408 (1944); *Mayo v. McCloskey & Co., supra,* The Court of Appeals also affirmed these holdings (Appendix pp. x-xi).

Southwest has not contended that these decisions were improperly applied. To the contrary, on the merits, the Court of Appeals was correct. This Court will not review cases turning on state statutes or rules of decision, such as those relating to negligence, contracts, and property, particularly where, as here, the Court of Appeals has reached a reasonable and permissible result. *See* R. Stern & E. Gressman, Supreme Court Practice 165 (4th ed. 1969). As this Court stated in *Huddleston v. Dwyer*, 322 U.S. 232, 237, 64 S.Ct. 1015, 88 L. d.1246 (1944), "ordinarily we accept and therefore do not review, save in exceptional cases, the considered determinations of questions of state law by the intermediate federal appellate courts." No such exceptional circumstances have been shown here.

2. *Limitation of tort liability under Arizona law.*

In addition to holding that the Westinghouse warranty was sufficient to limit Westinghouse's liability based on a theory of negligent breach of contract, the District Court stated that under the facts presented there could also be no recovery for consequential damages based upon a negligence theory apart from a contractual duty. As to the tort aspect of the case, Arizona law applies. (Appendix, p. xxvi). The District Court relied upon the general principles in Restatement (Second), Torts § 388 et seq., 1 F. Harper & F. James, Torts, § 6.10, at 509-10 (1956), and cases from other jurisdictions, since no Arizona authority was directly on point (Appendix, p. xxx).

Southwest has asked this Court to make an "unequivocal pronouncement" that manufacturers must correct any defects in their products in a non-negligent manner and, if they do not do so, respond in damages for any resulting consequential losses. (Petition, pp. 6-7). It has failed to show, however, that there is any

duty at all under tort law to compensate for consequential business losses or, even assuming such a duty might exist, that it was not limited by the Westinghouse warranty. Restatement of Torts (Second) § 323, upon which Southwest relies (Petition, p. 13), by its terms extends only to a duty to compensate for physical harm resulting from the failure to exercise reasonable care in rendering services necessary for the protection of another's person or things. This case simply does not involve such physical harm.

The Court of Appeals noted that Southwest might have waived its tort claim, but in any case affirmed on the merits as to the Arizona law. It is not even suggested in the petition that this was wrong. Even if it had been, this Court will defer to the Ninth Circuit on Arizona law. *See Speigel's Estate v. Commissioner*, 335 U.S. 701, 707-708, 69 S.Ct. 301, 93 L.Ed. 330 (1949), and the cases there cited. *See generally* R. Stern & E. Gressman, *supra*, at 165-66.

B. *This Case Turns Solely Upon Analysis of the Particular Facts Involved and Upon the Construction of A Particular Contract.*

The present case presented truly exceptional circumstances. The District Court and the Court of Appeals both looked in large measure to the conduct of the parties in determining the applicable warranty. In addition, the lower courts relied heavily upon the experience of the purchasing departments, staffs of engineers and legal departments available to Rust, Southwest, and Westinghouse, the familiarity of the purchasing departments involved with the Westinghouse order and acknowledgment forms, and Rust's great experience in purchasing electrical equipment from Westinghouse (Appendix, pp. ix, xxvii-xxviii). In determining the nature of the proceedings that had occurred in the District Court, the Court of Appeals also relied heavily on the disclosure at trial of documents from Southwest's files that its officers had previously said were lost or destroyed suggesting that Southwest's

own executives had assumed throughout the relevant period that the Westinghouse warranty was in effect (Appendix, pp. iii-iv). The issues presented to the District Court for decision involved the determination of which warranty controlled and the legal results of its interpretation as to the claimed consequential damages. Both issues required a detailed analysis both of the conduct of the parties on the particular facts presented and of the provisions of the warranty involved.

This Court does not sit to review fact questions in contract cases. R. Stern & E. Gressman, *supra*, at 172. As this Court stated in *United States v. Johnston*, 268 U.S. 220, 227, 45 S.Ct. 496, 69 L. Ed. 925 (1925), "we do not grant a certiorari to review evidence and discuss specific facts." This is particularly true when the two courts below have concurred. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 69 S.Ct. 535, 93 L.Ed. 672 (1949), and cases there cited; *Berenyi v. Immigration Director*, 385 U.S. 630, 635, 87 S.Ct. 666, 17 L.Ed. 2d 656 (1967).

C. *No Conflicts Have Been Suggested Between the Decision of the Court of Appeals and Other Decisions Which This Court Must Resolve.*

Southwest concedes that the current general state of the law is an "orthodox, restrictive interpretation of the alleged exculpatory warranties." (Petition, pp. 5-6). Southwest cites a number of cases from other jurisdictions sustaining the warranty provisions involved. (Petition, pp. 7-10). No conflicting authority whatever, whether of state courts of last resort or of other courts of appeals, is cited to support its contention that the decision of the Court of Appeals must therefore be reviewed; certainly there is none from the states involved. Instead, Southwest simply proposes that the Court accept its petition, decide this case, and thereby drastically alter the present state of the law.

Petitioner misses the point of *Erie R. Co. v. Tompkins*, *supra*, in which this Court held that there is no federal general common

law. What petitioner asks is precisely what this Court can not do. In litigation between private parties which does not touch the rights and duties of the United States, the *Erie* policy favoring application of state law prevents the application of federal law to transactions essentially of local concern. *Bank of America Nat. T. & S. Ass'n v. Parnell*, 352 U.S. 29, 77 S.Ct. 119, 1 L. Ed. 2d 93 (1956).

D. *This Case Does Not Involve Consumers.*

The question presented by Southwest for determination assumes that Southwest was a consumer (Petition, p. 2), and then wrings the bleeding heart. The petition asserts that the Court of Appeals decision is applicable to a "myriad of consumers." We submit that the case does not involve consumers at all.

In its determination that the doctrine of strict liability in tort did not extend to consequential damages in the present case, the Court of Appeals affirmed the District Court's findings that the circumstances " do not bring the plaintiff within that class of consumers, type of transaction, or damages suffered that created the need for relief based on strict liability in tort.' " (Appendix, p. xxii). The Court of Appeals also affirmed the District Court's holdings that Southwest, Rust, and Westinghouse all had experienced purchasing departments, staffs of engineers, and legal departments available, that Rust had had great experience in purchasing electrical equipment from Westinghouse, that the purchasing departments involved were familiar with the Westinghouse order acknowledgement forms, and that the unit was highly specialized, custom-built machinery, built to particular specifications and tested in the factory under supervision of engineers representing both parties. (Appendix, pp. ix, xii). No contention was made at trial that the Westinghouse form of warranty was unscionable (Appendix, p. ix).

There was no evidence before the District Court that Westinghouse had failed to perform its obligations under its warranty;

no offer was ever made to make any record supporting that claim. (*Id.*) Southwest repeatedly stated that its claimed damages were consequential, rather than consisting of personal injury or physical harm to property. The Court of Appeals expressly relied upon Southwest's characterization of its damages in sustaining the limitation of liability under Uniform Commercial Code § 2-719(1)(a). (Appendix, p. xii).

Even if this Court were willing to adjudicate the liabilities flowing from the burning of a house caused by a coffee pot's defective wiring, such a determination should be made when that case is before it. The present case does not present consumer or physical harm to property issues for decision.

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,

LEWIS & ROCA
By John P. Frank
Paul G. Ulrich
Attorneys for Respondent

September, 1970